

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department of )  
Telecommunications and Energy on its )  
own motion regarding (1) implementation of )  
Section 276 of the Telecommunications Act )  
of 1996 relative to Public Interest Payphones, )  
(2) Entry and Exit Barriers for the Payphone )  
Marketplace, (3) New England Telephone )  
and Telegraph Company d/b/a NYNEX'S )  
Public Access Smart-Pay Line Service, and )  
(4) the rate policy for operator service )  
providers. )

D.P.U./D.T.E. 97-88/18 (Phase II)

**MOTION FOR CLARIFICATION OF THE**  
**NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.**

The New England Public Communications Council, Inc. ("NEPCC"), in accordance with Section 1.11(10) of the Procedural Rules of the Department of Telecommunications and Energy ("DTE" or "Department"), 220 CMR §1.11(10), hereby submits the following Motion For Clarification ("Motion") of two fundamental aspects of Department's Order issued June 23, 2004 in this proceeding ("*Phase II Order*"). The grounds for the NEPCC's Motion are as follows:

**I. Background – The Order**

1. The lengthy procedural history of Phase II of this proceeding is well known. In December of 1997 the Department initiated this investigation with the announced purpose of determining "whether Verizon's [Public Access Line] PAL and [Public Access Smart-Pay Line] PASL tariffs complied with FCC requirements," as reflected in Section 276 of the Communications Act of 1934,

as amended, and various FCC implementing orders (“Payphone Orders”).<sup>1</sup> See *Phase II Order*, at p. 5. Six and one-half years later, after significant discovery, two hearings and numerous sets of briefs and comments, the *Phase II Order* directed that Verizon make a compliance tariff filing to reflect Total Element Long-Run Incremental Cost (“TELRIC”)-based PAL and PASL rates so that Verizon’s rates “will be in compliance with our directive for TELRIC-based rates and also with FCC requirements for payphone access line rates.” *Phase II Order*, at p. 30.

## **II. The Department’s Standard For Petitions For Clarification**

2. The Department, in this very proceeding, has stated that clarification of previously issued orders may be granted when an “order contains language that is so ambiguous as to leave doubt as to its meaning.” *D.P.U./D.T.E. 97-88/97-18 (Phase II-A)*, October 8, 1999, at p. 3; see also *Boston Edison Company*, D.P.U. 92-1-B, p. 4 (1993); *Whitinsville Water Company*, D.P.U. 89-67-A, pp. 1-2 (1992). The NEPCC respectfully submits that this standard is met in the case of two elements of the *Phase II Order* addressing the most fundamental issue involved in this lengthy proceeding – FCC-compliant payphone access rates. The NEPCC believes that the *Phase II Order* is inconsistent and ambiguous. Because these ambiguities deal with a central issue of the requirements of the Federal payphone regulatory regime, they must be clarified now.

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<sup>1</sup>As used herein the *Payphone Orders* consist of the following: *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, *First Report and Order*, 11 FCC Rcd. 20541 (1996); *Order On Reconsideration*, 11 FCC Rcd. 21233 (1996), *aff’d in part and remanded in part sub nom.*, *Ill. Public Telecomm. Ass’n v. FCC*, 117 F.3d 555 (D.C.Cir. 1997); *First Clarification Order*, 12 FCC Rcd. 20997 (Com. Car Bur. 1997); *Second Clarification Order*, 12 FCC Rcd. 21370 (Comm. Car. Bur. 1997); *Second Report and Order*, 13 FCC Rcd. 1778 (1997), *aff’d in part and remanded in part sub nom.*, *MCI Telecomm. Corp v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Third Report and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd. 2545 (1999), *aff’d*, *American Public Communications Council, Inc. v FCC*, 215 F.3d 51 (D.C.Cir. 2000); *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 15 FCC Rcd. 9978 (Com. Car. Bur. 2000) (“*Wisconsin I*”), *aff’d in part, Memorandum Opinion and Order*, 17 FCC Rcd. 2051 (2002) (“*Wisconsin II*”), *aff’d*, *New England Public Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

### **III. Grounds For Motion For Clarification**

The Commission has reached the correct result with respect to the need for rate adjustments. The NEPCC does not challenge that conclusion. From the NEPCC's perspective, subject to Verizon meeting the *Phase II Order's* directives on PAL rates in its compliance filings, those rates should be allowed to become effective immediately. However, the NEPCC raises the following two grounds for its Motion:

#### **A. Clarification Of Effective Date Of FCC-Compliant Rates**

3. First, on page 35 of the *Phase II Order*, the Department directs that Verizon's revised tariff pages, (i.e., those reflecting FCC compliant rates) "shall have an effective date 90 days from the date of the compliance filing." Since the compliance filing, by the *Order's* own terms, was due July 8, 2004, the effective date would be October 6, 2004.<sup>2</sup>

4. However, on the very next page of the *Order*, at the end of the "CONCLUSION" section, the Department now directs that "on the ninetieth day following the issuance of the Department's Order approving Verizon's compliance filing, the new rates shall be effective." This inconsistent directive creates the prospect that FCC-compliant rates might not take effect until some unknown date, dictated by the Department's docket and other responsibilities, that could be months, or given the history of this proceeding, years into the future. Clearly, such a result would violate the Department's determination in Docket 01-31 and, independently, the requirements of Section 276 and the *Payphone Orders*. The inconsistency creates a fundamental ambiguity on an issue central to this proceeding.

5. Verizon, to its credit, at least implicitly concedes that such a result would be unfair. In seeking an additional two weeks to make the required compliance filing, it committed to file the

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<sup>2</sup> In the meantime, the *Phase II Order* continues to allow rates which the Department concedes do not comply with FCC requirements to remain in effect.

“compliance tariff with an effective date of October 6, 2004, which is consistent with the Department’s 90-day effective date.”<sup>3</sup> But Verizon is of course not the authoritative interpreter of the Department’s orders.

6. In granting Verizon’s motion for additional time over the NEPCC’s opposition, the Hearing Officer who presided over Phase II conceded that this inconsistency is an “ambiguity” that “may require clarification by the Department.” *Hearing Officer Memorandum*, July 8, 2004. Although he indicated that he would treat the NEPCC’s argument in its opposition as a request for clarification, so that the NEPCC’s position on this issue is crystal clear, the NEPCC has filed this Motion. In any event, the FCC-compliant rates directed by the Department should not be delayed beyond October 6, 2004 and the Department should promptly issue an order removing the conceded ambiguity created by this internal inconsistency by stating that this is the specific intent and directive of the *Phase II Order*.

**B. Clarification Of Independent Bases For Requiring Adjusted Rates**

7. As noted previously, the Department initiated Phase II of the proceeding seeking to determine whether Verizon’s PAL and PASL tariffs complied with FCC requirements as reflected in Section 276 and the *Payphone Orders*. *Phase II Order*, at p. 5. Indeed, the *Order* opens by stating that it “concerns the requirements for pricing wholesale payphone access services under the Telecommunications Act of 1996 . . . and the applicable rules of the Federal Communications Commission.” *Id.*, at p. 1.

8. In DTE 01-31, while considering a wholly different issue, namely an alternative regulatory plan for Verizon, the Department decided, for reasons totally unrelated to the requirements of Section 276 and the *Payphone Orders*, that PAL services should be priced at Unbundled Network Element (“UNE”)/ TELRIC levels. *Id.*, at p. 9. At the very same time, the Department deferred to

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<sup>3</sup> *Motion of Verizon Massachusetts For Extension Of Filing Date*, July 6, 2004.

this docket the separate question of “whether Verizon’s proposed rates for PAL and PASL services comply with the FCC’s Payphone Orders.” *Id.*, at pp. 9-10.

9. Throughout the analytical sections of the *Phase II Order*, the Department refers to the appropriate cost methodology “consistent with” and necessary to “comply with” the FCC’s new services test, which is a key component of compliance with the FCC’s requirements. *Id.*, at pp. 12, 13, 16, and 23. And in directing that Verizon adjust its rates, the *Order* finds that upon such adjustment “Verizon’s PAL and PASL rates *will be in compliance* with our directive for TELRIC-based rates and also with FCC requirements for payphone access line rates.” *Id.*, at p. 30 (emphasis added). All of the foregoing reflects a recognition by the Department that its resolution of the pricing regime for PAL and PASL lines in the *Phase II Order* is satisfying two separate, independent and distinct regulatory requirements. One is self-imposed, as it relates to its decisions about an alternative regulation plan for Verizon, as outlined in Docket 01-31. The other is Federally imposed by the now long-standing requirements of Section 276 and the *Payphone Orders*.

10. However, in footnote 26, in noting the ongoing litigation concerning the UNE/TELRIC pricing regime as it relates to Verizon’s obligations under Sections 251 and 252 of the Communications Act, the *Phase II Order* raises the prospect that there is an inevitable tie in between decisions relating to what UNEs might be required under Section 251 and 252 and at what price, as applied to those obligations, and Verizon’s wholly-separate and independent obligations with respect to payphone access rates under Section 276 and the *Payphone Orders*. This last-minute, almost off-handed observation creates a fundamental ambiguity that must be clarified.

11. The Department should clarify and confirm that the rates it has ordered at this point satisfy the two independent requirements, with this Docket resolving, as it states in its introduction, “the

requirements for pricing wholesale payphone access services under the Telecommunications Act of 1996 . . . and the applicable rules of the Federal Communications Commission.”<sup>4</sup>

#### **IV. CONCLUSION**

11. In light of the foregoing, the NEPCC requests that the Department promptly and expeditiously grant this Motion For Clarification on the foregoing issues as requested.

12. The NEPCC reserves all other rights that it has under the Order and the applicable rules and regulations of the Department.

Respectfully submitted,

**NEW ENGLAND PUBLIC COMMUNICATIONS  
COUNCIL, INC.**

By its attorney,

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<sup>4</sup>The NEPCC is certainly aware of the regulatory developments concerning UNE/TELRIC pricing as it relates to Sections 251 and 252 of the Act. But adjustments that might be deemed appropriate in that realm, do not determine or change what the FCC, and the Department in its *Phase II Order*, are required to do by Section 276, as implemented by the FCC. Section 276 requires cost-based rates and UNE/TELRIC-based rates are an appropriate proxy for what is required by Section 276.